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Decision

Matter of: Monument Title Insurance, Inc.

File: B-406279.2; B-406279.3; B-406279.4

Date: October 15, 2012

Andrew J. Mohr, Esq., John J. O'Brien, Esq., and Gabriel E. Kennon, Esq., Cohen Mohr LLP, for the protester.

Eric G. Goodrich, Esq., and Jeremy C. Reutzler, Esq., Bennett Tueller Johnson & Deere, PC, for Cornerstone Title Insurance Agency, LLC, the intervenor.

Jay Lauer, Esq., Elizabeth S. Cypers, Esq., and Gabriel G. Lopez, Esq., Department of Housing and Urban Development, for the agency.

Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of proposals is denied where the record establishes that the agency's evaluation was reasonable and consistent with solicitation terms.

DECISION

Monument Title Insurance, Inc. of Cottonwood Heights, Utah, protests the award of a contract to Cornerstone Title Insurance Agency, LLC of Murray, Utah, under request for proposals (RFP) No. R-DEN-02542 issued by the Department of Housing and Urban Development (HUD) for closing agent services in the state of Utah. Monument challenges the evaluation of proposals and the resulting award decision.

We deny the protest.

BACKGROUND

On September 20, 2011, HUD issued the RFP as a small business set-aside for the award of a contract to provide closing agent services for sales of HUD's inventory of

single-family homes in Utah.¹ As amended, the RFP provided for award of a fixed-price requirements contract with a 1-year base period and four 1-year option periods. RFP at 1. The RFP advised that award would be made to the firm submitting the lowest-priced, technically acceptable proposal. Technical proposals were to be evaluated for acceptability under the following factors: (1) licensing requirement; (2) key personnel; and (3) past performance. Id. at 11. A proposal evaluated as unacceptable under any non-price factor was to be deemed unacceptable overall, and not considered further. Id.

The RFP's proposal preparation instructions for each evaluation factor emphasized the need for each offeror to submit a comprehensive, detailed technical proposal so that the agency could evaluate the firm's ability to perform the requirements identified in the performance work statement (PWS).² Id. at 8. The RFP added that the agency intended to evaluate proposals and make award without conducting discussions. Id.

Under the past performance factor, the evaluation of which is challenged by the protester, offerors were required to demonstrate that they had successfully provided a specified volume of transactions for services the same as, or substantially similar to, those contemplated by the RFP. Specifically, the RFP provided as follows:

Factor 3: Past Performance

The Offeror shall provide past performance information sufficient to demonstrate the offeror has successfully provided services the same as, or substantially similar to, those required under the solicitation, both in terms of type of service and scope of the requirements. The information shall show the offeror has, at a minimum, provided . . . the following volume of transactions:

¹ HUD, through the Federal Housing Administration (FHA), administers the Single Family Mortgage Insurance Program. Upon default and foreclosure of an FHA-insured loan, the mortgage lender files a claim for insurance benefits with HUD. In exchange for payment of the claim, the mortgage lender conveys the foreclosed property to HUD. As a consequence of this program, HUD manages and sells a sizeable inventory of single family homes.

² The RFP required each proposal to consist of two parts--a technical/management proposal, and a business proposal. RFP at 8-9. The instructions for the business proposal required, in relevant part, that the offeror identify "proposed consultants by name" or other description, and provide the "hourly rates and number of hours proposed" for each consultant. RFP attach. E, Contract Pricing Proposal Format, at 3.

A. Monthly average of 100 during the period from September 1, 2010 through August 31, 2011;

B. Monthly average of 75 during the period from September 1, 2009, through August 31, 2010; and,

C. Monthly average of 50 during the period from September 1, 2009, through August 31, 2008.

Id. at 8-9.³

The agency received three proposals, including those from Monument (the incumbent contractor) and Cornerstone, by the solicitation's closing date. As reflected in Monument's technical/management proposal, the firm provided the following performance references for the period September 1, 2009 through August 31, 2008:

Client Name	Average Monthly Volume	Period of Performance
1. HUD	[DELETED]	4/1/09 thru 8/31/09
2. Community Development Corporation of Utah	[DELETED]	9/1/08 thru 8/31/09
3. Utah Department of Transportation	[DELETED]	9/1/08 thru 8/31/09
4. Utah Housing Corporation	[DELETED]	9/1/08 thru 8/31/09
5. Prudential Utah Real Estate	[DELETED]	8/1/08 thru 8/31/09
6. Titanium Real Estate	[DELETED]	9/1/08 thru 8/31/09
7. Utah's Best Realty	[DELETED]	9/1/08 thru 8/31/09
8. USAA relocation through Coldwell	[DELETED]	9/1/08 thru 8/31/09
Total	55	

Agency Report (AR) exh. N, Monument's Technical/Management Proposal, at 16-18.

In its technical/management proposal, Cornerstone stated that while the firm has no prior history in handling any HUD contracts, the firm does have an extensive record of performing refinancing and second mortgage transactions. Cornerstone explained how the refinancing and second mortgage transactions it had performed were substantially similar to the solicited HUD closing services. Cornerstone also

³ The RFP also included a past performance information form, identified as Attachment C, on which offerors were to furnish the client name, contact information, type of services provided, contract number and value of the contract, date services were provided, and the principal partners or key personnel. The form indicated that an offeror could use additional pages as necessary. RFP attach. C, Past Performance Information. We note that both the protester and the awardee submitted a completed Attachment C form with their proposals.

provided the required information to show that it had performed the average monthly volume of transactions for each of the three years. AR exh. M, Cornerstone's Technical/Management Proposal, at 16-18.

The agency convened a technical evaluation panel (TEP) to evaluate the proposals received. The proposals submitted by Cornerstone and a third offeror (Metro National Title Company) were evaluated as technically acceptable under the non-price factors. The TEP, however, rated Monument's proposal as unacceptable overall based on an unacceptable rating under the past performance factor. The TEP found that Monument's average monthly volume for its HUD contract pertained to only a 5-month period. When this was considered, it was evident that Monument had failed to demonstrate its performance of an average of 50 closings per month for the full 12-month period of September 1, 2009 through August 31, 2008, as required by the solicitation. Contracting Officer Statement at 1-2 (July 27, 2012). Upon completion of the evaluation, the contracting officer, who served as the source selection authority, reviewed the evaluation findings and made award to Metro National, the offeror that submitted the lowest-priced technically acceptable proposal. Id.

After learning of the award decision, Monument filed a size protest with the contracting officer challenging the size status of Metro National, which was referred to the Small Business Administration (SBA). The SBA made a formal size status determination that Metro National was other than small, which was affirmed on appeal to the SBA's Office of Hearings and Appeals. Id. at 2.

Monument also filed a protest with our Office on December 22, 2011, alleging that the agency miscalculated its proposal under the past performance factor. Monument argued that even though it only submitted 5-months of HUD closing information for the performance period September 1, 2009 through August 31, 2008, HUD was obligated to supply the missing information from its own records.

In response to the earlier protest, the agency advised that it would take corrective action by canceling the award to Metro National, reevaluating proposals, to include considering the performance information for the closing services performed by Monument under its contract with the agency from September 1, 2009 back to August 31, 2008, and making a new award determination. HUD's Letter to GAO (Jan. 31, 2012). Accordingly, we dismissed Monument's protest as academic. Monument Title Insurance, Inc., B-406279, Feb. 2, 2012.

To implement the promised corrective action, HUD established a new TEP and reevaluated all proposals. As part of its reevaluation, the TEP considered information in the agency's contract files to determine "the number of closings" Monument had performed under its incumbent contract with HUD from March 30, 2009 back through August 31, 2008, the 7-month performance period

omitted from Monument's proposal. AR exh. K, HUD Final TEP Consensus Report, at 8-9. Based on its calculation for the entire period (September 1, 2009 through August 31, 2008), the evaluators found that Monument had performed a monthly average of 25 closings under its HUD contract. Id. at 9. Using the additional past performance references listed in Monument's proposal (which totaled an average of 14 closings per month), together with the monthly average calculated by the evaluators (an average of 25 closings per month), the TEP determined that Monument had performed an average of 39 closings per month for the performance year in question, less than the 50 per month average closings required by the solicitation. As a result, Monument's proposal was again assigned an unacceptable rating under the past performance factor.⁴ Id. at 10. The TEP rated the proposal submitted by Cornerstone as technically acceptable.⁵ Id.

Award was made to Cornerstone and following a debriefing, Monument filed its protest with our Office on July 6, 2012. The protester then filed supplemental protests on August 1, and on August 20.

DISCUSSION

Monument principally challenges the agency's evaluation of proposals under the past performance factor. In this regard, the protester argues that Cornerstone should have been found technically unacceptable because its past performance information did not meet the "stringent relevancy standard" set forth in the solicitation. Protest at 8, 12-15 (July 6, 2012); Protester's Comments at 2-3 (Aug. 23, 2012). More specifically, Monument contends that "HUD failed to account for Cornerstone's blatant admission that it had no experience conducting HUD real estate owned" closings. Suppl. Protest at 6 (Aug. 1, 2012). For example, Monument notes that the solicitation identified a number of HUD-specific requirements such as, requiring the contractor to utilize HUD's P260 system for uploading title search reports; communicating with the Asset Manager;⁶ uploading pre-closing package; completing the closing data in P260; and uploading the

⁴ The agency reports that even assuming that the protester had performed an average of 41 closings per month during the 5-month period listed in Monument's proposal, when combined with the TEP's calculation of 25 monthly closings for the remaining 7-months of the performance period at issue, the protester still fails to meet the required average of 50 closings per month during the 12-month period. Agency Memorandum of Law at 5.

⁵ Although the TEP found Metro National's proposal to be technically acceptable, it was not eligible for award since SBA had found the firm to be other than small.

⁶ An asset manager is a HUD contractor responsible for the marketing of HUD-owned properties. RFP, PWS at 4.

post-closing package into the P260 system--none of which Cornerstone had ever performed. Protester's Comments at 5, 14 (Aug. 23, 2012).

The evaluation of past performance, including the agency's assessments with regard to the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion, which we will not disturb unless those assessments are unreasonable or inconsistent with the solicitation's evaluation criteria. Yang Enters., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 5; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5. As discussed below, we have no basis to find the agency's evaluation of Cornerstone's proposal unreasonable.

The RFP stated that past performance would be evaluated based on an offeror's record of performing the same, or substantially similar services as those solicited. The RFP did not limit the agency's evaluation of past performance only to firms with a record of performing HUD closings or those for the sale of single-family homes. As the agency explains, when the solicitation is "distilled to its core functions" the refinance and second mortgage transactions relied upon by Cornerstone to establish its past performance are, in the agency's view, substantially similar to the closing services for the types of single-family sale transactions contemplated by the solicitation. In this regard, the agency notes that all of these types of transactions involve functions such as title searches, preparing items to clear title issues, preparation of HUD-1 settlement statements, scheduling and conducting the closing, obtaining necessary signatures, recording documents, and distributing funds. Agency Memorandum of Law at 7 (July 27, 2012). Although the protester fundamentally disagrees with the agency's determination that the transactions are substantially similar, arguing that the buy/sell nature of the HUD-specific transactions make them substantially different from refinance or second mortgage closings, see, Protester's Comments at 4-5 (Aug. 23, 2012), it is well-settled that a protester's mere disagreement with the agency's judgment is insufficient to establish that an evaluation was unreasonable.⁷ See, e.g., Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3; Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

⁷ Monument also provided performance data for Cornerstone to illustrate that the awardee had not performed the monthly average of 100 closings during the period September 1, 2010 through August 31, 2011. Protest at 16 (July 6, 2012). Even if we were to consider this performance data, apparently obtained by the protester from an unidentified party, as constituting objective, credible evidence regarding the volume of transactions performed by Cornerstone for the period in question--which we do not--Monument has not shown that any of the purported information was reasonably available to the TEP when they performed the past performance evaluation.

Alternatively, Monument argues that HUD “failed to amend the RFP to allow Monument Title to use refinancing and second mortgage transactions in its past performance references.” Protest at 18 (July 6, 2012). According to Monument, had it known that such information would be considered relevant, it would have provided additional information to meet the solicitation’s average monthly closing requirements. Protester’s Comments at 29-32 (Aug. 23, 2012); see also, Decl. of Ron Motzkus (Aug. 23, 2012). This argument, however, is based on the premise that the solicitation was inherently defective due to an ambiguity regarding the types of transactions that the agency considered to be relevant. We do not consider the solicitation’s use of the term “substantially similar” to be unreasonably ambiguous, and, in any event, the assertion is untimely as it constitutes an alleged solicitation impropriety apparent from the face of the RFP that was not timely raised by the closing time for receipt of proposals.⁸ 4 C.F.R. § 21.2(a)(1) (2012); Bevilacqua Research Corp., B-293051, Jan. 12, 2004, 2004 CPD ¶ 15 at 6 n.6.

Monument also alleges that Cornerstone’s proposal should have been rejected as unacceptable because the firm violated the limitation on the solicitation’s subcontracting clause, Federal Acquisition Regulation (FAR) § 52.219-14 (incorporated by reference), by proposing to use subcontractors to perform the solicited services. Suppl. Protest at 9 (Aug. 1, 2012); Suppl. Protest at 1-5 (Aug. 20, 2012). As support, the protester points to Cornerstone’s proposed use of a consultant and her assistants in performing a significant amount of the contract services, arguing that HUD unreasonably failed to consider the amount of work and costs that would be incurred by Cornerstone’s subcontractor.⁹ Protester’s Comments at 33-35 (Aug. 23, 2012).

⁸ The protester also asserts that the agency unequally evaluated Monument’s record of performance by limiting its evaluation to transactions that were fully closed and failing to consider instances where Monument may have performed many of the closing activities before “a deal falls through.” Suppl. Protest at 8 (Aug. 1, 2012). This allegation does not provide a basis to sustain the protest where Monument’s proposal did not identify other than fully closed transactions, it does not identify with particularity the transactions the agency allegedly should have considered, and does not identify specific instances where the agency considered other than fully closed transactions in its evaluation of Cornerstone’s past performance information.

⁹ There is much dispute among the parties concerning the characterization of Cornerstone’s consultant. In this regard, the solicitation defined a subcontractor as a “supplier, distributor, vendor, or firm that furnishes supplies or services to or for the Contractor, or another of Contractor’s subcontractors, in the performance of the contract.” RFP, PWS at 5. Based on this definition, it would appear that the services to be performed by Cornerstone’s consultant could reasonably be considered those of a subcontractor to the extent the services are provided in performance of the contract.

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. See Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

Here, based on our review of the record, nothing on the face of Cornerstone's proposal should have led the agency to reasonably conclude that Cornerstone could not, or would not, comply with the limitation on subcontracting requirement. Specifically, FAR § 52.219-14 requires the contractor to use its own employees to perform at least 50 percent of the cost of contract performance. In addition, there is no evidence that in determining Cornerstone to be responsible, the contracting officer failed to consider the information in Cornerstone's proposal regarding its use of the services of a consultant.¹⁰

The protest is denied.

Lynn H. Gibson
General Counsel

¹⁰ Monument also contends that the agency should have found Cornerstone's proposal "nonresponsive" and "unacceptable" because Cornerstone proposed to perform the contract using a consultant, yet failed to comply with the solicitation's subcontracting requirements concerning the agency's approval of the contractor's use of subcontractors during performance. This argument is misplaced since it is based on Cornerstone's failure to comply with post-award contract requirements and thus concerns a matter of contract administration, which is not for consideration by our Office. 4 C.F.R. § 21.5(a).